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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN on Behalf of Themselves and All Others Similiarly Situated,

Plaintiffs,

vs.

AT&T CORP., AT&T INC, and DOES 1-20, inclusive,

Defendants.

No. C-06-0672-VRW

OPPOSITION OF AT&T CORP. TO ELECTRONIC FRONTIER FOUNDATION'S ADMINISTRATIVE MOTION FOR DESIGNATION OF INTERIM CLASS COUNSEL

[Dkts. 213-15]

I. INTRODUCTION.

Defendant **AT&T CORP.** ("AT&T") hereby opposes the administrative motion of Electronic Frontier Foundation's ("EFF") for designation of interim class counsel ("Motion") (Dkt. 213-15).[1]

Designation of interim counsel for a putative class is not a proper subject for an administrative motion under Civ. L. R. 7-11. That rule is designed for simple administrative matters not otherwise addressed by a federal rule, statute or standing orders. EFF's power play is a far cry from an administrative motion. It seeks to resolve questions that are typically among the thorniest in class action litigation: How shall the class be defined? Who is best suited to represent it?

Rule 23 of the Federal Rules of Civil Procedure governs these complex matters, which are particularly difficult here, as EFF's Motion may affect not only the *Hepting* and *Roe* actions, but also *Campbell, et al. v. AT&T Comm. of California, et al.*, No. 06-03596-VRW (which is not even denominated a class action). EFF's Motion does not even scratch the surface of the issues it raises. The only "facts" that EFF submits are the resumes of several law firms. *See* Cohn Declaration (Dkt. 214) Exs. A-E. The Motion is otherwise devoid of facts supporting the designation of any interim class counsel. The Motion also does not explain whether EFF intends to sweep the *Campbell* plaintiffs or only the *Roe* plaintiffs into the *Hepting* plaintiff class. This is a power grab without a plan.

The Motion should be denied without prejudice. If *Hepting* is still pending after the June 23 hearing on the motions to dismiss, EFF can renew its motion, properly noticing it for hearing on the 35-day calendar provided by Civil Local Rule 7-2.

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[1] Defendants have standing to oppose this motion, as do other plaintiffs' counsel who might not want to cede control over their cases to EFF. A motion for appointment of counsel, or a motion regarding the propriety of counsel under Rule 23, may be litigated by defendants, or by other counsel competing for appointment. *See, e.g.*, *Lyon v. Arizona*, 80 F.R.D. 665 (D. Ariz. 1978) (granting defendant's motion to dismiss, in part, because counsel's conflict of interests and settlement procedures were improper under Rule 23); *In re Delphi ERISA Litig.*, 230 F.R.D. 496, 498 (E.D. Mich. 2005) (considering papers by three sets of counsel competing for status as interim counsel under Rule 23(g)).

II. ARGUMENT.

A. Civil Local Rule 7-11 is the wrong procedural vehicle for EFF's Motion.

Civil Local Rule 7-11 provides

> The Court recognizes that during the course of case proceedings a party may require a Court order with respect to miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or local rule or standing order of the assigned judge. These motions would include matters such as motions to exceed otherwise applicable page limitations or motions to file documents under seal, for example.

Civ. L.R. 7-11(b). It provides a mechanism for parties to address simple administrative matter that other rules, statutes or orders do not address. It therefore provides for quick resolution—four days instead of the 35 days set by Civ. L.R. 7-2(a).

But EFF is not seeking to resolve a simple administrative matter not governed by another provision of law, such as page limitations. Rather, EFF seeks to resolve substantial issues governed by Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure. *See Hill v. Tribune Co.*, 2005 U.S. Dist. LEXIS 23931, at *14 (D. Ill. 2005) ("Rule 23(g) provides criteria to consider when appointing class counsel. No distinction is made regarding appointing interim counsel."). Thus, Civil Local Rule 7-11 is not an appropriate vehicle for the Motion,[2] which should have been filed under Civil Local Rule 7-2 on 35 days' notice. *See also* Fed. R. Civ. P. 7(b). Proper notice is particularly important here, where thorough briefing by all affected parties and counsel will be required to address the scope of the class and who is best able to represent it. The time and space constraints imposed by Civil Rule 7-11 do not permit anyone to air these issues in the manner they deserve.

There is no reason that this matter must be decided on shortened time, especially now when the *Hepting* complaint faces multiple motions to dismiss set for hearing at the end of this week. Also currently pending is the motion of AT&T to relate the *Campbell* action to *Hepting* (Dkt. 208) and the cross-motion of the plaintiffs in *Riordan, et al. v. Verizon Communications, Inc.*, No. C-06-3574-JSW to relate *Campbell* to *Riordan* (*Riordan* Dkt. 3). Until the parties learn whether *Hepting* survives the week, and which case is related to which (and before which judge), this is a particularly inappropriate time to appoint interim class counsel, especially on three days' notice.

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[2] Even if Civ. L.R. 7-11 did apply, the Motion fails to comply with its most basic provisions. EFF did not attach a stipulation, or a declaration stating why a stipulation could not be reached. Civ. L.R. 7-11(a). It is also unclear whether all affected plaintiffs' counsel were even served with the Motion. *See infra* at II.B. EFF is seeking to take control of actions filed by other plaintiffs and other counsel. Therefore, one would expect at least some description of the efforts EFF has made to convince other counsel to cede control of their cases to EFF. On this record, one is left to guess whether other counsel even knew this motion was in the works.

EFF's Motion is not properly an administrative motion. It does not comply with the requisites for such motions. It therefore should be denied.

B. The Motion fails to explain the scope of the putative class, why interim counsel is required and why EFF should be appointed interim counsel.

Confined to five pages, the Motion begs more questions than it answers. It fails to address the essential issues posed by Rule 23(g)—why interim counsel is needed, why EFF should be appointed, and what the scope of the interim class should be, not to mention which cases should be consolidated, and before which judge.

EFF fails to offer any reasons why interim class counsel is needed now, when motions to dismiss *Hepting* are pending, related-case motions are being litigated, new cases are being filed and the Judicial Panel on Multidistrict Litigation has yet to rule on MDL status. Appointment of class counsel is not required unless and until a class is actually certified. Fed. R. Civ. P. 23(c)(1)(B). Indeed, deferring such a decision is appropriate where "there is reason to anticipate competing applications to serve as class counsel." Notes of Advisory Committee on 2003 amendments to Fed. R. Civ. P. 23(g)(2)(A). Interim counsel may be appointed "if necessary to protect the interests of the putative class," or to litigate over class certification, or if settlement is in the air, or if infighting among plaintiffs' counsel has created "rivalry or uncertainty that makes formal designation of interim counsel appropriate." *Id.* The only one of these criteria even mentioned in the Motion is "rivalry or uncertainty." Motion 3:21-23. But there is no allegation in EFF's papers that such rivalry or uncertainty actually exist among EFF and the other counsel in the related cases. All the Cohn Declaration provides are the resumes of EFF and its co-counsel firms.[3]

Another issue the Motion implicitly raises, but fails to address, is the proper scope of the putative plaintiff class. On this score, there is a tension between the Motion, which requests that EFF be appointed interim counsel "for the *Hepting* action, and other related, coordinated, or consolidated cases in the Northern District of California" (Motion 1:2-4), and EFF's accompanying Proposed Case Management Order Number 1 (Dkt. 215) ("Proposed Order"), which states that it applies to *Hepting, Roe* and "actions later instituted in, removed to, or transferred to this Court that involve the same or substantially similar issues." Proposed Order 1:12-17.[4] The Motion and Proposed Order leave open many questions, including whether *Campbell* and *Riordan*, non-class actions that may soon be related to *Hepting*, would be covered by the Motion. Likewise, would the Proposed Order cover the numerous other cases filed in other jurisdictions that may at some later date be transferred to this Court by the Judicial Panel on Multidistrict Litigation? Who knows?

So far as we know, no plaintiffs' counsel outside the jurisdiction has been served with the Motion or been given an opportunity to respond. It is not clear whether the plaintiffs in *Campbell* and *Roe* were served with the Motion (although one of their attorneys, Lawrence Pulgram, listed in the *Hepting* docket as counsel for plaintiff Tom Campbell, does appear to be receiving electronic notices of papers filed in *Hepting*). The Motion therefore raises due process questions for parties in jurisdictions across the country.

Under Rule 23, the Court must closely scrutinize these facts before appointing class counsel, and a court may not appoint an applicant unless and until it is satisfied that the requirements are met and counsel can ably and fairly represent the class.

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[3] *Donaldson v. Pharmacia Pension Plan*, Case No. 06-3-GPM, 2006 U.S. Dist. LEXIS 28607, 2006 WL 1308582 (S.D. Ill. May 10, 2006), cited by EFF, states that appointment of interim counsel may be proper where "overlapping, duplicative, or competing class suits are pending before a court." Motion 2:23-24. But the mere fact that there are duplicative actions is not a sufficient basis to appoint interim counsel. *See, e.g., In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.*, 234 F.R.D. 67 (S.D.N.Y. 2006).

[4] The fact that EFF has submitted a lengthy Proposed Case Management Order points up the inappropriateness of moving pursuant to Civil Local Rule 7-11.

> As Rule 23(g)(1)(C)(i) mandates, the Court must consider the following factors in appointing lead counsel: 1) the work that counsel has performed in identifying or investigating potential claims in the action; 2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; 3) counsel's knowledge of the applicable law; and 4) the resources that counsel will commit to representing the class.

In re Delphi ERISA Litig., 230 F.R.D. at 498 (citing Manual for Complex Litigation § 10.22, at 24-28 (4th ed. 2004)). While the Cohn Declaration attaches resumes, it does not address these other points. Because the Motion gives only the faintest hints on whether the criteria of Rule 23(g) are met here, even if the Motion were susceptible to expedited consideration under Local Rule 7-11, it would still have to be denied.

III. CONCLUSION.

The Court should deny the Motion without prejudice to the filing of a proper motion under Fed. R. Civ. P. 23(g) and Civ. L.R. 7-2.

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